No. 322

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

ROSCOE HERGET, TRUSTEE IN BANKRUPTCY OF N. L. ROGERS & COMPANY, INC., AN ILLINOIS CORPORATION, BANKRUPT,

Petitioner,

vs.

THE CENTRAL NATIONAL BANK & TRUST COMPANY OF PEORIA, A NATIONAL BANKING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States District Court for the Southern District of Illinois (R. 9) is reported in 53 F. Supp. 265. The opinion of the circuit court of appeals (R. 20-23) is reported in 141 F. 2d 150.

Jurisdiction

The judgment of the circuit court of appeals sought to be reviewed was entered February 5, 1944 (R. 23). Petition

for rehearing seasonably filed by petitioner (R. 25) was denied on April 5, 1944 (R. 31). By order of Mr. Justice Murphy entered June 10, 1944, time within which to file petition for certiorari was extended to August 5, 1944 (R. 34). Petition for a writ of certiorari was filed August 5, 1944, and was granted October 9, 1944 (R. 35). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether an action to recover a preference under section 60b of the Bankruptcy Act is by the limitation prescribed by section 11e of the same Act, added by the Chandler Act of June 22, 1938, barred at the end of two years from the date of adjudication or is, as petitioner contends and as is specifically provided in section 11e, barred only at the end of the longer period provided by state law—in this case five years.

2. Whether the five-year period of limitation prescribed by the Illinois Statute of Limitations, secs. 12 and 15, constitutes the period of time permitted by State law and adopted by section 11e of the Bankruptcy Act as the limitation for the bringing of actions based on rights created by the Bankruptcy Act such as the trustee's right to recover a voidable preference under Section 60b.

Statutes Involved

Subsection 11e of the Bankruptcy Act, added by the Chandler Act, June 22, 1938, c. 575, sec. 1, 52 Stat. 840, 849 (11 U. S. C. sec. 29e) provides:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit,

institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *[1]

The Illinois statute of limitations, Act of April 11, 1873, Laws 1873, p. 121 (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13-16) provides:

Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.

Sec. 13. Actions for slander or libel shall be commenced within one year next after the cause of action accrued.

Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction or for seduction, or for criminal conversation, shall be commenced within two years after the cause of action accrued.

Sec. 15. Actions on *unwritten contracts, express or implied*, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and *all civil actions not otherwise provided*

[1] Prior to the passage of the Chandler Act, the relevant provision of the Bankruptcy Act was (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

The Chandler Act amended this subsection so as to narrow its application to suits *against* the trustee (11 U. S. C. Sec. 29(d)):

Sec. 11d. Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed.

Suits *by* the trustee are covered by Section 11e added by the Chandler Act.

for, shall be commenced within five years next after the cause of action accrued. (Emphasis supplied.)

Statement

The complaint alleged, and the defendant's motion to dismiss (R. 7) admitted the pertinent facts:

On April 11, 1938, N. L. Rogers & Company, Inc., an Illinois corporation, was adjudged a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division (R. 2). Petitioner was elected trustee on May 25, 1938 and immediately thereafter qualified as such trustee (R. 2).

On March 3, 1942, more than two, and less than five, years after the adjudication, Roscoe Herget, the petitioner, as Trustee in Bankruptcy of the Rogers Company, filed his complaint under Section 60b of the Bankruptcy Act (11 U. S. C. Sec. 96(b)) in the same court against the respondent, The Central National Bank & Trust Company of Peoria, a national banking corporation, to recover preferences amounting to $308,122.58 alleged to have been given by the bankrupt to the respondent at a time when the bankrupt was insolvent and the defendant had reasonable cause to believe the bankrupt to be insolvent, all within four months prior to the filing of the petition in bankruptcy, April 11, 1938 (R. 2-4).

The defendant (respondent herein) moved to dismiss the complaint on the ground that because the suit had been instituted at a date more than two years subsequent to the date of the adjudication in bankruptcy, it was barred by the provisions of section 11e of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stat. 840, 849 (R. 7-8).

The district court held that the cause of action accrued with the appointment and qualification of the trustee, and

because it arose under the Bankruptcy Act, it was barred by section 11e upon the expiration of two years from the date of appointment of the trustee and entered its order accordingly (R. 9-11). Petitioner appealed.

On February 5, 1944, the circuit court of appeals filed its opinion, holding petitioner's cause of action barred by the two-year clause of section 11e and not within the operation of the alternative clause of the same subsection: "or within such further period of time as the * * * State law may permit," so as to make applicable the five-year period permitted by the State Act, secs. 12, 15, Ill Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13, 16, p. 2012 (R. 20-23). Judgment of affirmance was entered the same day (R. 23). Petition for rehearing was denied April 5, 1944 (R. 31).

Specifications of Error

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that under subsection 11e of the Bankruptcy Act, action to recover preferences is barred unless brought within two years subsequent to the date of adjudication.

2. In failing to hold that under subsection 11e of the Bankruptcy Act the period of limitations on actions to recover preferences in the Federal courts for Illinois is the five-year period provided by section 15 of the Illinois Statute of Limitations and adopted by reference by subsection 11e.

3. In holding that the clause of the first sentence of subsection 11e permitting institution of proceedings on any claim "within such further period of time as the Federal or State law may permit" is inapplicable to actions to recover preferences.

4. In interpolating the language "permitting or creating the cause" in the second alternative clause of the first sentence of section 11e so as to make it read "within such further period of time as the Federal or State law [permitting or creating the cause] may permit."

5. In holding that "since it is the Bankruptcy Act which creates the cause, it must provide the period for bringing it."

6. In holding that "there is no applicable state statute for the reason that the cause of action was not created by the State."

7. In failing to hold that the alternative clause of the first sentence of subsection 11e applies, according to its terms, to all proceedings by the trustee in behalf of the estate upon any claim regardless of the law creating such claim.

8. In holding that the clause of section 11e expressly adopting the limitation fixed by State or Federal law does not extend to causes of action created by the Bankruptcy Act.

Summary of Argument

Taken in its ordinary and received import, the language of Section 11e of the Bankruptcy Act requires reference to the state statute of limitations for ascertainment of the period of limitation on suits arising under Section 60b of the Bankruptcy Act. Sections 12 and 15 of the Illinois statute of limitations plainly allow the trustee five years from the date the cause of action accrued within which to bring suit. The cause of action here accrued not earlier than April 11, 1938 and suit brought by the trustee on March 3, 1943 was plainly within time.

The legislative history and other antecedents through which the development of Section 11e of the Bankruptcy

Act may be traced confirm that the section means exactly what it says. Section 11e acknowledges the applicability of federal or state statutes of limitation and merely guarantees that the trustee shall have a period of at least two years from the date of adjudication within which to institute proceedings on behalf of the bankrupt estate.

The construction of Section 11e by the circuit court of appeals perverting the language and purpose of the statute and treating the two-year protective clause as a statute of limitations with respect to causes of action arising under the Bankruptcy Act ignores the Rules of Decision statute (R. S. sec. 721) and is founded on the erroneous propositions of law that a federal statute creating a cause of action must also provide the period for bringing it, and that state statutes of limitation cannot apply to causes of action created by federal statute. *Campbell* v. *Haverhill*, 155 U. S. 610; *Rawlings* v. *Ray*, 312 U. S. 96.

Because no legitimate reason has ben advanced for departing from the plain language of Section 11e, it should be enforced according to its terms and the judgment below reversed.

Argument

The facts alleged in the complaint are admitted by the motion to dismiss. The cause of action arose on April 11, 1938, the date of adjudication (R. 27). Suit was filed by the trustee March 3, 1943, more than two, but less than five, years subsequent to that date (R. 2).

The trustee relies on the provisions of section 11e of the Bankruptcy Act as amended (11 U. S. C. sec. 29e):

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation

> fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

And the trustee further relies on sections 12 and 15 of the Illinois Statute of Limitations (Ill. Rev. Stats. (State Bar ed. 1943) c. 83, secs. 13 and 16):

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute:
>
> Sec. 15. Action on unwritten contracts * * * and, all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

Because section 11e provides that the trustee may institute proceedings in behalf of the estate upon "any claim" within two years subsequent to the date of adjudication *or within such further period of time as the * * * State law may permit*, the trustee contends that suit brought within the five-year period fixed by the Illinois law, and by section 11e adopted by reference, is within time.

The circuit court of appeals placed the ground of its affirmance of the trial court squarely on a purported paraphrase of the statute involving a violent interpolation of language so as to narrow the ambit of the clause "within such further period of time as the Federal or State law may permit" and make the period established by state law operative only where such further period is "provided by the statute permitting or creating the cause" (R. 22). A fundamental error also appears in the court's holding (R. 22): "since it is the Bankruptcy Act which creates the cause of action here, it must provide the period for bringing it * * *."

I. The Meaning of the Statutes Is Clear and They Require No Construction

The basic error in this case lies simply in the failure of the courts below to concede to Congress the ability to state the legislative purpose and in their failure to follow the plain language of the statute notwithstanding the absence of any precedent or legislative history to justify departure from the letter of the law.

A. **Section 11e of the Bankruptcy Act is a statute of extension and, save for its specific two-year enlargement of time, plainly makes suits by the trustee subject to federal and state statutes of limitation.**—The language of section 11e is clear and effect may be given to all its parts without necessity for construction or interpolation such as that in which the court below engaged. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618. Section 11e obviously authorizes suit by the receiver or trustee within two years subsequent to date of adjudication *or* within the period of time permitted by other federal or state law, whichever is longer, with the proviso that no claim already barred at the date of the petition shall be revived.[2] The time provision in the first sentence of section 11e is unitary although stated in the alternative; the two alternative clauses are unseparated even by a comma and obviously fix a single mode of measurement to be applied to "any claim." As was stated by this

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[2] The concluding and modifying clause, "against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition" obviously has only the same effect as though it were in specific proviso form such as was used in the Bankruptcy Act of 1867, Sec. 2 (14 Stat. 518):

> "*Provided*, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed."

Court in *United States* v. *Goldenberg*, 168 U. S. 95, 102-103:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

No reason for departure from the general rule was suggested by the court below. Taken in their ordinary and received import and according to accepted rules of grammar and punctuation the words of subsection 11e require reference to the state statute of limitations to ascertain the time there permitted for the bringing of such a suit. If longer than two years, the trustee is to have the benefit of it.

It is therefore submitted that the meaning of Section 11e is plain without necessity for construction.

B. **The Illinois state law permits suit on this claim at any time within five years after the cause of action accrues.**— The Illinois Statute of Limitations (Illinois Rev. Stats. (State Bar ed.), c. 83, provides:

> Sec. 12. The following actions can only be commenced within the periods hereinafter prescribed, *except when a different limitation is prescribed by statute:* * * *
>
> Sec. 15. Actions on unwritten contracts, express or implied * * * and all civil actions *not otherwise provided for*, shall be commenced within five years next after the cause of action accrued.

Respondent in the court below argued that within the meaning of the italicized clauses, section 11e prescribed "a different limitation" and this action is, thus "otherwise provided for."

The respondent's theory leads only into a sort of statutory and endless renvoi which can be resolved only by resolving the main question—the meaning of section 11e. For respondent asserts that the initial reference in section 11e to the state statute brings up against the provision in section 12 of the state law: "except when a different limitation is prescribed by statute." Respondent takes this as a re-reference to section 11e of the Bankruptcy Act and on the re-reference selects the two-years clause as constituting a "different limitation" "prescribed by statute," this time entirely ignoring the clause which refers to the state law. The respondent's theory thus involves a circular reasoning which cannot be accepted because of its absurdity. For there is no more reason on the re-reference for thus ignoring and nullifying the part of section 11e which adopts the further period permitted under state law than for so doing on the initial consideration of section 11e. Cf. 1 Beale, Conflict of Laws, sec. 7.3, pp. 56-57.

When section 11e provides for "such further period of time as the * * * State law may permit" it is difficult to comprehend how it may be regarded as providing "a different limitation" or as making the action one "otherwise provided for" within the meaning of those clauses as used in the sections of the Illinois statutes above quoted. Even if "statute" as used in Section 12 of the Illinois law be deemed to include Federal statutes, it still is clear that "a different limitation is [not] prescribed by statute" because the Federal statute expressly prescribes two years "or within such further period of time as the Federal or State law may permit". In section 15 of the Illinois law, even if the phrase "not otherwise provided for" be deemed

to contemplate Federal as well as state statutes, it is nevertheless clear that in section 11e the proceeding under section 60b is not "otherwise provided for." The limitation in section 11e of the Bankruptcy Act must necessarily be that of the two alternative periods which is the longer. Since the longer alternative results from the reference adopting the five-year period provided in section 15 of the state law, it cannot reasonably be said that limitation on proceedings under section 60b of the Bankruptcy Act is "otherwise provided for" within the meaning of section 15 of the Illinois statute of limitations.

Read separately, the meaning of the two statutes, federal and state, is clear. Taken together, as required by the reference in section 11e of the Bankruptcy Act, they plainly provide that the proceeding by the trustee on a cause of action arising under section 60b may be brought at any time within five years after the cause of action accrued. Certainly, the cause of action under section 60b could not have accrued earlier than April 11, 1938, the date of the voluntary petition and adjudication (R. 2). If the statutes be given their plain meaning, therefore, the complaint filed and served on March 3, 1943 (R. 4-5) was in time and was wrongly dismissed.

II. The History and Objectives of Subsection 11e Require That It Be Applied in Accordance With Its Plain Letter.

The difficulties it was intended to obviate and its legislative history all show that subsection 11e was drawn having due regard to the Rules of Decision statute and that it was intended primarily merely to postpone for two years the falling of the bar of the statutes of limitation, federal or state, which, in the absence of specific limitation in the Bankruptcy Act, would apply to all suits brought by the

trustee and in some instances might bar action by the trustee before he had had opportunity to act or before the expiry of the two-year period contemplated as an essential minimum.

A. **The language of Section 11e is the result of careful and prolonged study by experts in the field.**—Section 11e as added by the Chandler Act represents no hurried legislative action to meet problems only dimly perceived. In large part it represents the work of the National Bankruptcy Conference, an unofficial body organized in 1932 and made up of various groups interested in the perfecting of the Act, including the American Bar Association, the Commercial Law League, the American Bankers Association and many others. The drafting committee[3] of the Conference prepared and discussed seven successive drafts of a bill directed toward a general overhauling of the 1898 Act (Hearings, H. Committee on the Judiciary, H. R. 6439, amended, re-introduced and reported as H. R. 8046, June 1937, p. 2). For at least two years other numerous and eminentemembers of the legal profession, referees in bankruptcy, specialists in bankruptcy, judges and professors gave their best efforts to the drafting of this law. The House Judiciary Committee worked on the bill for a period in excess of four years (81 Cong. Rec., Pt. 8, pp. 8646-8647 (1937)).

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[3] The drafting committee included such men as:

Paul H. King, Chairman, member of the Advisory Committee on Commercial Law and Bankruptcy, American Bar Association, Chairman of the Committee on Uniformity of Practice, National Association of Referees in Bankruptcy, Detroit, Michigan.

Carl D. Friebolin, Chairman, Committee on Legislation, National Association of Referees in Bankruptcy, Cleveland.

James A. McLaughlin, Harvard Law School.

Jacob I. Weinstein, member, Bankruptcy Committee, Commercial Law League of America, Philadelphia, Pa. (16 Doc., A. G. Comm. on Bank. Admn. (2d Ser.) Doc. No. 10, p. vi).

B. **Section 11e was addressed to specific problems.**— Subsection 11e is not an amendment of subsection 11d. On the contrary, it is an entirely new subsection. We recognize, therefore, that little or no direct assistance in the interpretation of subsection 11e is to be obtained by reference to decisions construing subsection 11d of the 1898 Act or the provisions as to limitations contained in section 2 of the Bankruptcy Act of 1867. The decisions under section 11d of the 1898 Act are helpful, however, insofar as they point out the ambiguities and moot the questions which were sought to be remedied by passage of subsection 11e. The specialists who had to do with the drafting were thoroughly conversant with these decisions and, of course, addressed their efforts to the problems presented by them:

(1) On its face the statute was ambiguous because of its reference to "two years after an estate has been closed." See 6 J. N. A. Referees Bank. 61, 65; S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 77th Cong., 1st sess. (1932) pp. 932-933; 9 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 1.

(2) Question had arisen as to whether re-opening and again closing the estate extended the time. *Bilafsky* v. *Abraham*, 183 Mass. 401 (1903); *Kinder* v. *Scharff*, 231 U. S. 517 (1913).

(3) The decisions were in conflict as to whether the statute extended the period fixed by state law. 6 J. N. A. Referees Bank. 61, 65. See e.g. *Davis* v. *Willey*, 273 Fed. 397 (C. C. A. 9, 1921); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C. C. A. 5, 1935). It had been specifically held that because subsection 11d was in the form of a *prohibition* and purported only to limit the time within which a suit could be brought, it could not be construed to *extend* the period

fixed by State law. *Charlesworth* v. *Hipsh*, 84 F. 2d 834, 837 (C. C. A. 8, 1936).[4]

(4) It had also been indicated that because the trustee's title did not vest until date of adjudication, the trustee could not sue on a cause of action barred as of that date. *In Re Dunavant*, 96 Fed. 542; *Harrod* v. *Farrar*, 68 Kan. 153, 157 (1903); *Garland* v. *Arrowood*, 172 N. C. 591, 593 (1916).

Most of these ambiguities and problems had been recognized as early as 1930. In September 1931, the committee on legislation of the National Association of Referees in Bankruptcy recommended a number of changes in the Act. In recommending amendment of subsection 11d so as to make it read approximately as does the first sentence of subsection 11e as finally enacted,[5] that committee

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[4] In construing subsection 11d before its amendment, this same distinction between *limitation* or *prohibition* as contrasted with *extension* was followed as late as 1941 in *Nairn* v. *McCarthy*, 120 F. 2d 910, 912 (C.C.A. 7). Judge Major in that case held:

> "As we read the provision, however, it does not grant an extension of time, but is a prohibition against the institution of actions either by or against the Trustee subsequent to the designated time. It does not follow from the fact that the Trustee is prohibited from bringing an action subsequent to that time that he is authorized to maintain an action prior thereto, irrespective of an applicable limitation statute. The provision is more for the protection of the Trustee than for his benefit and, in any event, is for the purpose of terminating his duties and responsibilities. As was said in *Charlesworth* v. *Hipsh, Inc.*, 8 Cir., 84 F. 2d 834, 837 in discussing this provision: '* * * Time in which the trustee may sue cannot be extended by provision in the Bankruptcy Act which purports only to limit the time within which a suit may be brought by or against him. * * *'"

[5] The suggestion as to the form of amendment was as follows (6 J. N. A. Referees Bank. 61, 65):

> "Amend § 11(d) pertaining to limitations of actions by or against the trustee to read as follows:
>
> "'§ 11(d). Suits shall not be brought by ("or against" omitted) a trustee of a bankrupt estate subsequent to two years after adjudication of the bankrupt, where the period of limitation fixed by state law has not expired at the time of the filing of the petition; unless at the expiration of such period of two years, the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control.
>
> "'§ 11(e). Suit shall not be brought by (or against) a trustee of an bankrupt estate subsequent to two years after an estate has been closed.'"

said (6 J. N. A. Referees Bank. 61, 65):

> Decision under this section are in hopeless confusion. Question arises why should the trustee bring a suit after the estate has been closed when he is *functus officio*. Question also arises whether this means two years after the case has been reopened and closed. There is some doubt in some of the cases as to whether the state law limitation controls in some instances, or whether this is an exclusive limitation.[6] As amended it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the statute of limitations within that period. In other words, if the statute has not run at the time *the petition* in bankruptcy is filed, the trustee has two years after *adjudication* to bring suit. By fixing two years after adjudication, there can be no question but that the reopening of a case would not extend the time. *Moreover, if the statute of a state provides a longer period, the provision as amended would not reduce the period.*

At the annual conference of the National Association of Referees in Bankruptcy in 1932 a report of the Committees on Legislation and Uniformity of Practice submitted a number of recommendations as to amendments, included in which was the suggestion that section 11(d) be amended to read (7 J. N. A. Referees Bank. 3, 6-7):

> Suits shall not be brought by (or against) a receiver or a trustee of a bankrupt estate subsequent to two years after (an estate has been closed) the filing of the petition where the period of limitation fixed by state law, if any, has not expired at the time of the filing of the petition; unless, at the expiration of two years,

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[6] Compare *Schreck* v. *Hanlon*, 66 Neb. 451, 453 (1902); *Shelton* v. *Parker*, 66 Neb. 610, 628-631 (1902); *Fuller* v. *Rock*, 125 Ohio State 36 (1932); *Isaacs* v. *Neece*, 75 F. 2d 846, 850 (C.C.A. 5, 1935) with *Davis* v. *Willey*, 273 Fed. 397 (C.C.A. 9, 1921); *Silverman* v. *Christian*, 123 N. J. Eq. 506 (Ch. 1938).

the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control.

In the same year in the course of hearing on the abortive Hastings-Michener bill which included no amendment of section 11(d), Mr. Reuben G. Hunt, Esq., an eminent bankruptcy practitioner of Los Angeles stated (S. Hearings, Subcommittee of the Committee on the Judiciary, S. 3866, 72d Cong., 1st sess. (1932) pp. 932-933):

> Section 11-d is ambiguous. It provides that suits shall not be brought by a trustee subsequent to two years after an estate has been closed. This really does not mean anything because when an estate is closed the trustee becomes officially dead. The idea is to extend the time within which the trustee may commence suit, although, if there were no bankruptcy, the time limit in which to commence a similar suit by the bankrupt himself was about to expire at the time of the bankruptcy, or did expire shortly after bankruptcy. This section can be amended by providing that suits shall not be brought subsequent to two years after the adjudication, where the state statute of limitation has not expired at the time of the filing of the petition, unless at the end of such two years the state limitation has not expired, in which event the state limitation shall control.

In his summary of advocated changes submitted at the same hearing Mr. Hunt suggested (Id., p. 988):

> Strike out subdivision (d) of section 11 as it is presently constituted and insert in lieu thereof the following:
>
> "Suits shall not be brought by a receiver or trustee of a bankrupt estate subsequent to two years after the adjudication of the bankrupt, where the period of limitation fixed by state law, if any, has not expired at the time of the filing of the petition unless at the ex-

piration of such period of two years the period of limitation fixed by state law has not expired, in which event the limitation fixed by state law shall control."

These historical antecedents of section 11e as finally incorporated and enacted in the Chandler Act are important because of the prominent part played by the National Association of Referees in Bankruptcy in the work of the National Bankruptcy Conference and because Mr. Hunt was one of the draftsmen on the drafting committee of the latter body which contributed so much to the writing of the Chandler Act.

C. **Section 11e, drafted and construed solely as a statute of extension, solved the problems presented.**—No substantial change of subsection 11d, insofar as it operated as a statute of limitations barring suit against the trustee, was deemed desirable. Therefore, it was left in its prohibitory form with certain clarifying changes but modified expressly to omit reference to suits *by* the trustee.[7] But subsection e departs radically in form from the language used in subsection d as originally enacted and as amended. The subsection is entirely new.[8] Faced with the necessity of eliminating the questions of interpretation and operation of subsection 11d of the 1898 Act outlined above, it was an obvious step for the draftsmen, as had the earlier proponents of amendment, to revert by reference to the laws of the several states as constituting the primary measure of limitation just as they would under the Rules of Decision statute, and to erect on that foundation the two-year provision as being the minimum time within

[7] See fn. 1, supra, p. 3.

[8] Although the period of two years may have been adopted from the Bankruptcy Acts of 1841 and 1867, the permissive form of subsection 11e contrasts sharply with the definite prohibitions of those two statutes.

which the trustee should be required to act. Under this new subsection it becomes plain that a trustee can bring a suit within two years after adjudication regardless of the expiration of the period of limitations fixed by State or Federal law either subsequent to the filing of the petition and prior to adjudication or prior to the lapse of two years after adjudication. By fixing two years after adjudication there can be no question but that the reopening of the case would not extend the time. There can be no invocation of the two-year period to bar claims or causes of action accruing subsequent to adjudication and otherwise suable because the two-year provision with its reference to "such further period as the Federal or State law may permit" purports not to impose a bar but rather merely to create a protective extension such as is often given under State law to administrators of estates of decedents. Cf. New York Civil Practice Act, Sec. 20; Ill. Rev. Stats. (State Bar ed. 1943) c. 83, Sec. 20; Wood on Limitations (4th ed.) Sec. 196, pp. 919-921.

Because it is purely a statute of extension, Section 11e is not to be construed to cut down the period within which suit might otherwise be brought.

D. **The legislative history shows that subsection 11e was throughout regarded not so much as a statute of limitations but primarily as establishing a minimum period for proceedings by the trustee despite the running of the period of limitation otherwise applicable.**—It is highly significant that in the development of subsection 11e it was treated by those concerned with its drafting as merely suspending the fall of the bar of the statute of limitations. Appended to one of the earlier drafts submitted by the National Bankruptcy Conference in May 1933 was a note

which insofar as it related to subsection 11 stated (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 5, p. 23):

> Consider * * * "(e)" in connection with Referee McAllester's[9] proposal that "during the pendency of the bankruptcy proceedings and for the prosecution of claims and demands for and against the bankruptcy estate local statutes of limitations shall be suspended."

Appended to a redraft of Section 11 by the National Bankruptcy Conference submitted to the House Judiciary Committee on April 22, 1935, was the following note (15 Doc., A. G. Comm. on Bank. Adm'n (2d Ser.) Doc. No. 8, p. 32):

> The principle changes proposed in this section are:
>
> A reduction in the period from two years to one within which suits may be brought against a person who has acted as the Trustee, with an extension of this limitation to receivers.
>
> A new provision whereunder receivers and Trustees may bring action upon causes expiring by limitation under the law between the date of the filing of the petition and date of adjudication.
>
> A new provision whereunder the operation of State statutes of limitation is suspended.

The first and third paragraphs refer to subsections 11d and 11f respectively. The second paragraph refers to subsection 11e and it is important to note therein the absence of any reference to a limiting effect in subsection 11e as contrasted with the direct reference in the first paragraph of the note respecting the limitation appearing in subsection 11d. The same note was appended to an analysis of H. R. 12889 (introduced by Congressman Chandler on May 28, 1936) prepared for the use of the House Judiciary Com-

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[9] The reference apparently is to Sam J. McAllester, Esq., at that time referee in bankruptcy for the District Court for the Eastern District of Tennessee.

mittee by the National Bankruptcy Conference (16 Doc., A. G. Comm. on Bank. (2d Ser.) Doc. No. 10, p. 35).

H. R. 6439 introduced on April 15, 1937, embodied subsection 11e substantially as it appeared in the earlier bill. On July 28, 1937 Mr. Chandler introduced H. R. 8046 as a substitute for H. R. 6439 in which subsections 11d and 11e were unchanged except that for the first time there appeared in subsection 11e the second sentence with which we are not here directly concerned. It is pertinent to note, however, that in urging the adoption of the second sentence of subsection 11e, at least insofar as it related to the provisions of agreements, Mr. Teitlebaum, representing the members of the Bankruptcy Committee of the Association of the Bar of the State of New York, treated the first sentence of subsection 11e, not as creating, but rather as tolling the limitation period. After reading the first sentence of subsection 11e in the bill he said: (Hearings, H. Committee on the Judiciary, H. R. 6439 amended, re-introduced and reported as H. R. 8046, 75th Cong. 1st sess. (1937) p. 33-35):

> In other words, it tolls the statute of limitations against a receiver or Trustee and gives him a further opportunity to bring any action which the estate may have, which otherwise he may be debarred from bringing by reason of the operation of a Federal or State statute of limitations.
>
> • • • • • • •
>
> It tolls the statute for that period of time, in order to give an opportunity to the successors in interest, the receiver or Trustee, to take appropriate action.

As pointed out by Mr. Teitlebaum, the second sentence of subsection 11e accomplishes the same result as to matters other than causes of action.

The House report accompanying the bill was equally innocent of any reference to subsection 11e as establishing

any period of limitations. It stated (H. Rept. No. 1409, 75th Cong. 1st sess. (1937) p. 20):

> A new provision in subdivision e permits receivers and trustees within two years after the adjudication to institute suits on claims against which the period of limitation fixed by Federal or State law had not expired at the time of the bankruptcy or within such further time as the Federal or State law may permit.

Bearing in mind that it was the purpose of subsection 11e to clarify ambiguities and resolve conflicts which had developed in the application of subsection 11d of the Bankruptcy Act, it seems clear that if Congress had intended that section 11e should provide a time within which trustees may sue causes of action arising under the Bankruptcy Act different from the period applicable to those arising under other statutes or at common law, then it would have found words which clearly so provided and would have added to section 11e at the end of the first sentence, after the word "bankruptcy," some such language as the following:

> provided that as to actions which did not exist prior to bankruptcy, but are created by this Act only, the trustee or receiver shall have only two years to institute proceedings after the date of adjudication.

It thus appears that the House committee which most intimately knew all phases of the Chandler Act regarded subsection 11e primarily as merely providing a minimum period—two years from adjudication—within which the trustee or receiver may institute proceedings.[10] Neither the language of the section nor any discovered intent or policy afford foundation for construing the subsection as cutting down the period of limitation fixed by other Fed-

[10] An obviously inaccurate and incomplete reference to sub-section 11e in the Senate report does refer to it as fixing a period of limitations (S. Rept. No. 1916, 75th Cong. 3rd sess. (1938) p. 2).

eral or state law and which, under familiar principles and the Rule of Decisions statute, would control any action by the trustee were the Bankruptcy Act entirely silent on the matter. However, for clarity section 11e specifically affirms that the trustee is authorized to proceed "upon any claim" within "such further period of time as the Federal or State law may permit".

In conformity with the legislative history of the subsection, and giving proper scope to its plain language, the effect of subsection 11e is stated as follows in 1 Collier on Bankruptcy (14th ed.) sec. 11.13, pp. 1186-1188:

> Subdivision e operates as a statute of limitations on suits brought in behalf of the estate by the receiver or trustee. The language of the subdivision clearly indicates that it has reference to suits initiated subsequent to the time of bankruptcy. If the federal or state period of limitation applicable to a claim has not run prior to the filing of the petition in bankruptcy, § 11(e), which is in the nature of a special statute of limitations, is applicable and supersedes the state or federal statute of limitations to the extent that the trustee or receiver has at least two years from the date of adjudication in which to commence suit. Under former subdivision d, this point was subject to some confusion. • • • *In the event that the applicable state or federal statute is longer in duration than the two-year period specified in subdivision e, the subdivision provides that the receiver or trustee may sue "within such further period of time as the federal or state law may permit."* • • •
>
> It should be noted, however, that subdivision e has altered the span of time within which the receiver or trustee may bring suit as compared to former subdivision d. It is now provided that the time allowed is 'within two years subsequent to the *date of adjudication*", or such further period of time as the federal or state statute of limitations may permit. Former subdivision d allowed suit within two years after the estate was closed. Such a limitation was extremely

indefinite and had no real connection with a suit which a receiver or trustee might institute on behalf of the estate.

The character of the suit or proceeding brought is immaterial, so long as it is "in behalf of the estate." (Emphasis supplied.)

Confirmation of the view that, so far as applicability of Federal or State statutes of limitation are concerned, section 11e makes no differentiation between causes of action arising under the Bankruptcy Act and other causes is found in Weinstein, The Bankruptcy Law of 1938, p. 41[11]:

A receiver or trustee may proceed upon a claim of the estate, if not outlawed at the date of bankruptcy, within two years after the date of adjudication. However, if the period of limitation under applicable Federal or State law extends for a longer time, then such longer time shall be available to the receiver or trustee.

This [subsection 11e] is a new subdivision which is made up of two provisions. The first provision has been derived from the old subd. d, but has been revised to include a receiver and modified to reduce the period of limitation in respect to suits by a receiver or trustee from two years after the date of *closing the estate* to two years after the date of *adjudication*. The date of the closing of an estate bears no logical relation to the time for the commencement of suits by a receiver or trustee and, furthermore, it is too uncertain. Where, however, a longer period than two years after the date of adjudication is available under applicable Federal or State law, such longer period shall apply.

In its fullness subsection 11e may properly be deemed to meet all the problems of interpretation that arose under the old law and to state the controlling law as to proceedings on behalf of the estate by the receiver or trustee on any claim which existed in favor of the bankrupt or a cred-

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[11] See fn. 3, supra, p. 13.

itor, on any claim or cause of action created by the Bankruptcy Act and on any claim or cause of action accruing subsequent to adjudication. But to cover all, the subsection must be applied according to its terms and without reading into it exceptions or limiting provisos foreign to its letter and plain intent.

III. The Opinion of the Circuit Court of Appeals Is Plainly Erroneous

After attributing to petitioner an involved interpretation of the applicable state statutes for which there is no support in the record or the briefs, the court below found the meaning of subsection 11e "quite simple" but only after adding to that subsection a clause which radically changes the enactment of Congress (R. 22).

A. **The court below erred in adding words that substantially change the meaning of the statute.**—Admitting that no case was strictly in point (R. 23), and without suggesting any other authority, justification or necessity, the court, by a judicial amendment of section 11e interpolated the following italicized language so as to make the section read:

> Section 11e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law *creating the cause of action* may permit, institute proceedings in behalf of the estate upon any claim * * *.

There is plainly no basis for this interpolation by the court below. None has been suggested, and the legislative history gives rise to no inferences upon which it may be sustained. Section 11e, by reference to the state laws, makes the alternative period of limitations, the five-year period allowed by state law, just as much an integral part of the limitation provisions of section 11e of the Bankruptcy Act as if physically enacted in terms by Congress.

Cf. *Kendall* v. *United States*, 12 Pet. 524, 625; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85.

However, the Circuit Court of Appeals purports to justify elimination of consideration of this alternative longer period of limitation under the state law by invoking a supposed rule that the statute which creates a cause of action must provide the period for bringing it and "there is no applicable state statute for the reason that the cause of action was not created by the state."

B. **The decision below proceeds on the basically erroneous premise that the federal statute creating a right must also provide the applicable period of limitations.**—The opinion of the court holds (R. 22):

> Since it is the Bankruptcy Act which creates the cause of action here, it *must* provide the period for bringing it, and in the absence of other provisions, the two-year one applies. • • •
>
> • • • *There is no applicable state statue for the reason that the cause of action was not created by the state.* • • • (Emphasis supplied.)

These propositions are plainly erroneous. It is well recognized that causes of action are frequently created by federal law without specific prescription of periods of limitation for the enforcement thereof. It is also established that when a cause of action arises under a federal statute containing no provision for any period of limitation, the result is to make operative the Rules of Decision Statute, 28 U. S. C. sec. 725, under which the state statute of limitations will necessarily control. *Campbell* v. *Haverhill*, 155 U. S. 610, 614-616; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390, 397; *Rawlings* v. *Ray*, 312 U. S. 96; *Williamson* v. *Columbia Gas & Electric Corporation*, 110 F. 2d 15 (C. C. A. 3, 1940) cert. denied 310 U. S. 639.

Perusal of the opinion makes it clear that the decision is founded upon this misconception of elemental law in clear conflict with the decisions of this Court. Since the rule invoked by the circuit court of appeals to eliminate the reference in section 11e to the "further period" under state law is non-existent, it seems plain that the Section 11e is to be applied according to its terms and under it the limitation period of five years fixed by the state statute is applicable.

Conclusion

The plain meaning of section 11e of the Bankruptcy Act, confirmed by the legislative history and other antecedents, requires the conclusion that the alternative clause of section 11e permitting suit by the trustee in behalf of the estate "within such further period of time as the Federal or State law may permit" embraces all such proceedings by the trustee and is not limited to causes of action other than those arising under the Bankruptcy Act. The applicability of the five-year period fixed by the state Statute of limitations cannot reasonably be questioned. The decision of the circuit court of appeals is based upon plainly erroneous propositions of law and is admittedly without supporting precedents. For these reasons it is respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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